NO. 47312-7-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

I.G.,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR GRAYS HARBOR COUNTY

The Honorable David Edwards, Judge

OPENING BRIEF OF APPELLANT

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A. SUMMARY OF APPEAL

Appellant I.G. seeks accelerated review, pursuant to RCW 13.40.230 and RAP 18.13, of the conviction for second degree assault and a manifest injustice disposition imposed by the Honorable David Edwards, on February 19, 2015. Upon review, I.G. requests this Court reverse and vacate the adjudication, or in the alternative, to reverse the manifest injustice disposition and remand for entry of a disposition within the standard range.

B. ASSIGNMENTS OF ERROR

1. There was insufficient evidence produced by the State to support an adjudication for second degree assault by strangulation.

2. Appellant assigns error to Finding of Fact [FOF] 6. Clerk's Papers (CP) 13.

3. Appellant assigns error to FOF 7. CP 13.

4. Appellant assigns error to FOF 8. CP 13.

5. Appellant assigns error to Conclusion of Law (CL) 5. CP 13.

6. Appellant assigns error to CL 6. CP 13.

7. Appellant assigns error to CL 7. CP 13.

8. Appellant assigns error to CL 8. CP 13.

9. The State failed to present sufficient evidence establishing beyond a reasonable doubt that I.G. is guilty of assault in the second degree by strangulation.

10. The juvenile court erred in imposing a manifest injustice disposition in the absence of sufficiently compelling facts.

11. The juvenile court erred in entering the following FOF in the finding of Manifest Injustice:

> In the commission of the offense, or in flight therefrom, the respondent inflicted or attempted to inflict serious bodily injury to another.
>
> CP 22.

12. The juvenile court erred in entering the following finding:

> There are other complaints which have resulted in diversion or a finding or plea of guilty which are not included as criminal history
>
> CP 22.

13. The juvenile court erred in entering the following findings:

> Respondent is a threat to the community. Respondent is beyond parental control. Respondent has mental health and drug and alcohol needs that cannot be addressed in the community.
>
> CP 22.

14. The juvenile court erred in concluding that a disposition within the standard range would constitute a manifest injustice. CP 22.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State to prove every element of the charged offense beyond a reasonable doubt. To prove second degree assault by strangulation, the State must prove the defendant compressed a person's neck and obstructed that person's blood flow or ability to breathe, or compressed a person's neck with the intent to obstruct the person's blood flow or ability to breathe. Was the evidence insufficient to prove assault in the second degree where the State elicited no medical testimony regarding the alleged injury, and where the only evidence presented was that the complainant had red marks on her neck and said that her brother grabbed her around the neck? Assignments of Error 1-9.

2. Whether there was sufficient evidence elicited at trial to establish beyond a reasonable doubt that I.G. is guilty of assault in the second degree? Assignments of Error 8 and 9.

3. Whether the court erred in finding that a standard range disposition was too lenient in the absence of sufficiently compelling facts? Assignments of Error 10-14.

4. A manifest injustice disposition must be supported by clear and convincing evidence. Where the record does not contain a factual basis for its findings, should this Court reverse I.G.'s sentence and remand

for a sentence within the standard range? Assignments of Error 11-13.

5. Do the trial court's findings fail to support its finding of a manifest injustice? Assignment of Error 14.

6. Is the manifest injustice and order of disposition clearly excessive? Assignment of Error 14.

D. STATEMENT OF THE CASE

1. Procedural history and trial testimony:

I.G. (DOB 8/26/98) is the brother of H.G. Report of Proceedings (RP) at 11.[1] Following an incident at their house in Aberdeen, Washington, the State charged I.G. with assault in the second degree by strangulation. RCW 9A.36.021(1)(g). Clerk's Papers (CP) 1-2.

The matter proceeded to a fact-finding hearing on December 8, 2014, the Honorable David Edwards presiding.

H.G. testified that on November 17, 2014, her brother came into her room to get a laptop computer and she told him that he could not use it. RP at 19. H.G. testified that initially they were involved in a "cat fight" and that she pushed him, and that he grabbed her neck and squeezed it and that she was unable to breathe. RP at 19, 20. A police officer was called to the house and he observed red marks on H.G.'s neck. RP at 12.

[1] The Verbatim Report of Proceedings consists of one volume. Hearings took place November 18, and December 4, 2014. A fact-finding hearing took place on December 8, 2014, and entry of the disposition order took place on February 19, 2015.

When contacted by police, I.G. had scratch marks on his face. RP at 13. When admitted to juvenile detention, I.G. acknowledged that he had used methamphetamine on that day and had issues with managing his anger. RP at 13.

2. **Adjudication, findings of fact and conclusions of law:**

The court found that I.G. was guilty of assault in the second degree as charged. RP at 33. The court entered the following relevant findings of fact pursuant to JuCrR 6.1, on January 22, 2015:

. . .

2. [H.G.] is [I.G.]'s sister.

. . .

4. On November 17, 2014, [I.] and [H.] got into an argument.
5. [I.] attempted to enter [H.]'s bedroom, and [H.] pushed him away.
6. [I.] grabbed [H.]'s throat with both of his hands and applied full pressure to her throat and neck.
7. [H.] was unable to breathe or to speak and gasped for air.
8. [H.] instinctively scratched [I.]'s face in an effort to get him to release his grip on her throat.
9. Officer Glaser noted that [H.] had red marks around her neck.
10. Officer Glaser arrested [I.] for assault.
11. Officer Glaser noted the [I.] had small defensive scratch marks on the left side of his face.
12. [I.] told Officer Glaser that he had defended himself against [H.]
13. [I.] told Officer Glaser that he has severe problems with his anger and is addicted to Methamphetamine.

CP 12-13.

The court entered the following relevant conclusions of law:

. . .

3. The Respondent testified that both of the State's witnesses lied.
4. The Respondent's story did not make sense, nor did it explain the red marks around [H.]'s neck.
5. It was apparent to Officer Glaser that the injuries to both [H.] and [I.] were consistent with strangulation.
6. The Finder of Fact was convinced beyond a reasonable doubt that [I.] strangled [H.]
7. All other elements of Assault 2 were established.
8. [I.] is guilty as charged of Assault 2.

CP 13.

3. Disposition and appeal:

The court imposed a manifest injustice disposition of 80 to 100 weeks' commitment in the Juvenile Rehabilitation Administration (JRA). RP at 49. The order recited the following aggravating factors:

> [X] In the commission of the offense, or in flight therefrom, the respondent inflicted or attempted to inflict serious bodily injury to another.
> [X] There are other complaints which have resulted in diversion or a finding or plea of guilty which are not included as criminal history.
> [X] Respondent is a threat to the community. Respondent is beyond parental control. Respondent has mental health and drug and alcohol needs that cannot be addressed in the community.

CP 24.

Timely notice of appeal was filed on March 6, 2015. CP 30. This appeal follows.

/ / /

/ / /

E. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT I.G. WAS GUILTY OF ASSAULT IN THE SECOND DEGREE.

a. Strangulation requires proof of restriction of the airflow or the intent to restrict.

The State charged I.G. with only a single alternative of second degree assault: assault by strangulation. CP 1. He submits the State failed to prove he strangled his sister, thus the conviction must be reversed.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *Jackson v. Virginia,* 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct, 2781 (1979). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas,* at 201; *State v. Craven,* 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all

inferences that reasonably can be drawn therefrom. *Salinas,* at 201; *Craven,* at 928.

Here, the State charged I.G. with second degree assault pursuant to RCW 9A.36.021(1)(g). The statute states in relevant part:

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> . . .
>
> (g) Assaults another by strangulation.

RCW 9A.36.021(1)(g).

'Strangulation' means to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe. . . ." RCW 9A.04.110(26). Under RCW 9A.04.110(26), the element of intent is necessary when the defendant does not actually obstruct either the victim's blood flow or ability to breath.

Here, the sum of the State's evidence to prove assault by strangulation is H.G.'s testimony that I.G. entered her room and grabbed her throat during a fight over the laptop computer. RP at 19-20. H.G. claimed that she and her brother were initially engaged in a "cat fight," and after she pushed him, he grabbed her neck with both hands and squeezed it and that she could not breathe. RP at 20, 24-25. An officer testified that she

had red marks on her throat. RP at 12.

I.G. disputed the claim that he grabbed H.G. around the neck, and denied that he cut off her breathing. RP at 27-28. I.G. stated that she shoved him first and then swung her hand at his face. RP at 27. He admitted he pushed her on her shoulders and pushed her up against the wall after she initially pushed him and swung at him. RP at 27, 28. He stated that he acted in self-defense and denied that he grabbed her throat and denied cutting off her airway. RP at 27-28. He acknowledged that he used methamphetamine after the incident. RP at 29.

The State presented no medical testimony regarding I.G.'s injury. RP at 8-36. The evidence presented at trial failed to establish that I.G. obstructed H.G.'s ability to breathe, or that he intended to restrict her ability to breathe.

Given the totality of the evidence presented at trial it cannot be said that the State established beyond a reasonable that I.G. assaulted his sister, thus his conviction for second degree assault must be reversed.

b. I.G. is entitled to reversal of his second degree assault conviction with instructions to dismiss.

If the reviewing court finds insufficient evidence to prove an element of the crime, reversal is required. *State v. Lee,* 128 Wn.2d 151, 164, 904 P.2d 1143 (1995). Since there was insufficient evidence to support the conviction for second degree assault, this Court must reverse the

conviction with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

2. THE RECORD DOES NOT SUPPORT THE AGGRAVATING FACTORS RELIED ON FOR IMPOSITION OF THE MANIFEST INJUSTICE, AND THE SENTENCE IS CLEARLY EXCESSIVE

a. This court should grant accelerated review because I.G. received a disposition outside the standard range.

Both statute and court rule provide for accelerated review of juvenile dispositions outside the standard range. Manifest injustice dispositions entered in cases involving juvenile offenders are subject to accelerated review pursuant to RCW 13.40.230. RAP 18.13 provides for accelerated review of juvenile dispositions outside the standard range.

The standard range for second degree assault is 15 to 36 weeks. RCW 13.40.0357. The juvenile court imposed a 80-100 week manifest injustice disposition. RP at 47. Because I.G. received a disposition outside the standard range for this offense, he asks this Court to accelerate

review of his case. RAP 18.13.

b. The reasons given by the juvenile court do not clearly and convincingly support a finding of manifest injustice.

The Juvenile Justice Act (JJA) provides sentencing standards for juvenile offenders. See RCW 13.40.0357. However, where a court finds that disposition within the standard range would effectuate a manifest injustice, the court may impose a sentence outside the standard range. RCW 13.40.160(2). The JJA defines "manifest injustice" as a disposition that would either impose an excessive penalty on the juvenile or would impose a serious and clear danger to society in light of the purposes of the JJA. RCW 13.40.020(19).

A juvenile court may enter an exceptional disposition beyond the standard range only if it finds a "manifest injustice" by "clear and convincing evidence" that a disposition within the standard range would be clearly excessive or clearly too lenient. RCW 13.40.160(2), RCW 13.40.230; *State v. M.L.*, 134 Wn.2d 657, 660, 952 P.2d 187 (1998); *State v. Beaver*, 148 Wn.2d 338, 345, 60 P.3d 586 (2002); *State v. J.N.*, 64 Wn.App. 112, 114-15, 823 P.2d 1128 (1992). The reviewing court applies a clearly erroneous standard and reverses where 'no substantial evidence' supports the trial court's conclusion. *J.N.*, 64 Wn. App. at 114.

Review is limited solely to the record before the disposition court. *State v. Rhodes,* 92 Wn.2d 755, 760, 600 P.2d 1264 (1979).

RCW 13.40.150 provides a list of aggravating factors which the juvenile court should consider to determine whether a manifest justice disposition is justified. RCW 13.40.150(3) provides:

> Before entering a dispositional order as to a respondent found to have committed an offense, the court shall hold a disposition hearing, at which the court shall:
> ....
> (i) Consider whether or not any of the following aggravating factors exist:
> (i) In the commission of the offense, or in flight therefrom, the respondent inflicted or attempted to inflict serious bodily injury to another;
> (ii) the offense was committed in an especially heinous, cruel, or depraved manner;
> (iii) the victim or victims were particularly vulnerable;
> (iv) The respondent has a recent criminal history or has failed to comply with conditions of a recent dispositional order or diversion agreement;
> (v) The current offense included a finding of sexual motivation pursuant to RCW 13.40.135
> (vi) The respondent was the leader of a criminal enterprise involving several persons;
> (vii) There are other complaints which have resulted in diversion or a finding or plea of guilty but which are not included as criminal history; and
> (viii) The standard range disposition is clearly too lenient considering the seriousness of the juvenile's prior adjudications.

RCW 13.40.150 is not an exclusive list of manifest injustice factors. Both statutory and non-statutory aggravating factors may support a manifest injustice disposition *State v. Rhodes,* 92 Wn.2d 755, 759, 600

P.2d 1264 (1979), *overruled on other grounds, State v. Baldwin,* 150 Wn.2d 448, 78 P.3d 1005 (2003).

In this case, the Order on Adjudication/Disposition cited the following aggravating factors to support a manifest injustice: (1) I.G. inflicted of serious bodily injury to another, (2) other complaints have resulted in diversion or a finding or plea of guilty which are not included as criminal history, (3) I.G. is a threat to the community, (4) I.G. is beyond parental control, and (5) mental health and drug and alcohol needs that cannot be addressed in the community. CP 22.

The court noted that I.G. was frequently before the court, primarily due to his history of appearing in truancy court and his status as a "youth at risk." RP at 39, 42. I.G. submits that his record as a truant and his prior involvement with the court for non-criminal matters cannot be considered in the imposition of a manifest injustice and do not constitute facts "sufficiently substantial and compelling to distinguish the crime on appeal from others in the same category[.]"

The court noted that I.G. had had numerous bench warrants for his arrest and considered him to be flight risk. RP at 38. The warrants, however, are not related to criminal matters, but instead focus on truancy and "youth at risk" petitions. The Court appears to focus on a lack of parental control and I.G.'s deplorable home circumstances rather than

actual criminal behavior that cannot be controlled or treated by local sanctions. I.G. argues that the record before the Court does not "clearly and convincingly" support a manifest injustice disposition, and that the punishment imposed by the court reflects a lack of appropriate placement for I.G. rather than a need for more than one year in the JRA. I.G. submits that the court imposed placement in the JRA simply because it had no other place to put him, which is not authorized by the Juvenile Justice Act.

c. A standard range disposition is not clearly too lenient

As noted *supra*, a requirement of RCW 13.40.230 is "that the sentence imposed is neither clearly excessive nor clearly too lenient." A reviewing court should vacate a manifest injustice if the length of the disposition is clearly excessive. RCW 13.40.230(2)(b). Once the juvenile court has concluded that a disposition within the standard range would effectuate a manifest injustice, however, the court is vested with broad discretion to determine the appropriate disposition. *State v. M.L.*, 134 Wn.2d 657, 952 P.2d 187 (1998).

In this case, because the court provided little explanation for the choice of 80 to 100 weeks as a term of commitment, the juvenile court's disposition constitutes an abuse of discretion. *State v. ex. rel. Carroll*

Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); *State v. S.S.*, 67 Wn. App. 800, 819, 840 P.2d 891 (1992). An abuse of discretion will be found when the term is based on untenable grounds or for untenable reasons. *State v. Tauala*, 54 Wn. App. 81, 88, 771 P.2d 1188, rev. denied, 113 Wn.2d 1007 (1989). While a juvenile court's determination of the appropriate length of a sentence is a matter of discretion, the court "should not pick a number out of thin air." *State v. Sledge*, 83 Wn. App. 639, 646, 922 P.2d 832 (1996) (citing *State v. B.E.W.*, 65 Wn. App. 370, 828 P.2d 87 (1992)). *See also, State v. Wood*, 42 Wn. App. 78, 84 P.2d 709 P.2d 1209 (1985), *rev. denied*, 105 Wn.2d 1010 (1986).

Here, the period of 80 to 100 weeks is evidently taken from thin air. The court notes that I.G. also had an evaluation by Dr. Keith Krueger recommending that it would take 9 to 12 months to treat I.G. CP 20. The court gave little indication for the length of the sentence other than acknowledging that I.G. has "a long history with this court" involving truancy and the "youth at risk" program, has an absent father and was outside of his mother's control. RP at 43, 44. Nothing in the record, however, indicates why this length of confinement was necessary, despite the requirement that the record reveal the basis for the disposition. *See Wood*, 42 Wn. App. at 84.

d. The length of the disposition is excessive

To uphold manifest injustice disposition, reviewing court must find that length of disposition is not clearly excessive. *State v. Strong,* 23 Wn. App. 789, 794-95, 599 P.2d 20 (1979). A sentence is clearly excessive when it cannot be justified by any reasonable view of the record. *M.L.,* 134 Wn.2d at 660. In *State v. P.*, 37 Wn. App. 773, 779, 686 P.2d 488 (1984), the trial court imposed an exceptional sentence based on the juvenile's need for treatment but imposed a sentence in excess of the duration of the treatment. *Id.* The Court of Appeals reversed, the length of the sentence as clearly excessive because the sentence exceeded the length of 156 weeks. *Id.*

In this case, the court also found as an aggravating factor that I.G. committed an injury to his sister in the commission of the offense, which is clearly already included in the charged crime of assault. CP 22. The nature of the assault, however, was already contemplated by the Legislature and included in the standard range. The factor cannot support the finding of manifest injustice, primarily because it has already been accounted for in formulating the standard range disposition. *See e.g., State v. Payne*, 58 Wn. App. 215, 221, 795 P.2d 134 (1990); *State v. Gutierrez*, 37 Wn. App. 910, 915, 684 P.2d 87 (1984).

More compellingly, I.G's lack of criminal history should have

served as a mitigating factor.

The sentence is excessive and must be vacated because it cannot be justified by any reasonable view of the record. *M.L.*, 134 Wn. 2d at 660-661.

e. Reversal of the manifest injustice disposition is required.

If one or more of the reasons cited by the court justifying a manifest injustice disposition is invalidated, the appellate court may uphold the sentence only if it can determine that the court would have imposed the same sentence based upon the remaining aggravating factors. *State v. S.H.*, 75 Wn. App. 1, 12, 877 P.2d 205 (1994), *rev. denied*, 125 Wn.2d 1016 (1995); see also *State v. Payne*, 58 Wn. App. 215, 222-23, 795 P.2d 134 (1990).

Here, none of the factors on which the court relied in imposing the manifest injustice disposition are valid. None establish beyond a reasonable doubt that it would be a manifest injustice to impose the standard range for this charge. The disposition in this case was not supported by clear, cogent, and convincing evidence in the record.

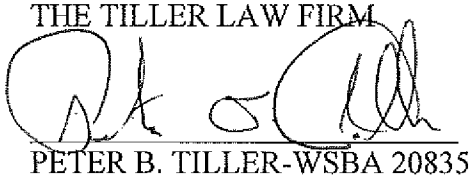
This Court should reverse this disposition and remand for imposition of a disposition within the standard range. *See State v. P.*, 37 Wn. App. 773, 777-78, 686 P.2d 488 (1984); RCW 13.40.230(4).

F. CONCLUSION

For the reasons stated, I.G. requests this Court reverse his conviction for second degree assault and order it dismissed. Alternatively, the manifest injustice disposition should be reversed and remanded for a standard range disposition.

DATED: May 21, 2015.

Respectfully submitted,
THE TILLER LAW FIRM



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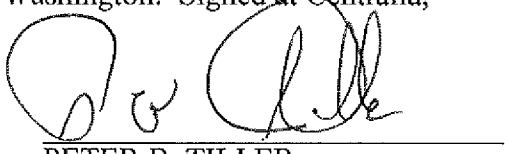
CERTIFICATE OF SERVICE

The undersigned certifies that on May 21, 2015 that this Opening Brief was sent by JIS link to the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid to Lynda Stone, Grays Harbor County Prosecutor, 102 W. Broadway Ave., Montesano, WA 98563-3621 and to the appellant, I.G., Naselle Youth Camp, 11 Youth Camp Lane, Naselle, WA 98638 **LEGAL MAIL**.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on May 21, 2015.



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